SUPREME COURT, U.S.
FILED

01-1380 MAR 15 2002

No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAMES T. SINYARD and
MONIQUE T. SINYARD,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners James T. and Monique T. Sinyard (collectively "Sinyards") respectfully request the United States Supreme Court to issue a Writ of Certiorari to review the decision of a divided panel of the United States Court of Appeals for the Ninth Circuit in which two judges upheld the judgment of the United States Tax Court that fees paid to counsel pursuant to court order in an Age Discrimination in Employment Act ("ADEA") class action were reportable income to the Sinyards as well as to their counsel, while the dissenting judge held these fees should not be deemed reportable income to the Sinyards. The Ninth Circuit's split decision upholding the Commissioner of Internal Revenue's ("Commissioner") double taxation of such fees in this case mirrors the split among the United States Courts of Appeals with respect to these fundamental issues:

1. Whether treatment of attorneys' fees paid by an opposing party for federal income tax purposes should be decided by the attorneys' lien rights of individual states or by a uniform federal standard.

2. Whether the assignment of income doctrine requires that attorneys' fees paid from funds recovered from an opposing party must be construed as income to both a plaintiff and to his/her attorney.

3. Whether the Commissioner's policy of taxing both the victim of age discrimination and his/her attorney for fees paid pursuant to the ADEA violates the plain remedial language and purpose of the ADEA.

PARTIES TO THE PROCEEDINGS

Petitioners James T. Sinyard and Monique T. Sinyard have petitioned for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The Sinyards are represented by Winthrop & Weinstine, P.A., and Gray, Plant, Mooty, Mooty & Bennett, P.A. Respondent Commissioner of Internal Revenue ("Commissioner") will presumably be represented in this matter by the Office of the Solicitor General of the United States.

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The Opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported at 268 F.3d 756 (9th Cir. 2001). The Opinion of the United States Tax Court in this matter is reported at T.C. Memo. 1998-364 (1998).

STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its order on April 27, 2001, and its subsequent opinion on September 25, 2001. The Ninth Circuit thereafter filed its order denying the timely filed Petition for Rehearing on December 17, 2001. Judgment was entered on December 26, 2001. Jurisdiction is proper in the Supreme Court of the United States pursuant to 28 U.S.C. sections 1254(1) and 2101(c) and Rules 13.1 and 13.3 of the Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED IN THE CASE

Title 29 United States Code section 626(b) of the Age Discrimination in Employment Act incorporates the remedial provisions from the Fair Labor Standards Act ("FSLA") as follows:

> (b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid

minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference and persuasion.

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), ***216 (except for subsection (a) thereof)***, and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of section 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement of promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

29 U.S.C. § 626(b) (emphasis added).

Title 29 United States Code section 216(b) of the FSLA, which is expressly incorporated in section 626(b) of the ADEA, reads as follows:

> (b) Damages; right of action; attorney's fees and costs; termination of right of action.
>
> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. ***Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.*** An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in benefit of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff in any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. ***The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.*** The right provided by this subsection to bring an action by or on behalf of any employee,

> and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

29 U.S.C. § 216(b) (emphasis added).

STATEMENT OF THE CASE

This case arises as a result of the Commissioner's policy of taxing victims of age discrimination on attorneys' fees that employers are legally obligated to pay under the federal statutory provisions of the Age Discrimination in Employment Act and which, in the instant case, were paid pursuant to court order. The Commissioner's policy in this regard results in an uneven application of the federal tax laws, a misapplication of the assignment of income doctrine, and an unfair imposition of income tax on employees in violation of the plain statutory terms and purposes of the ADEA.

Mr. Sinyard was a plaintiff member of nationwide class action proceedings that included employees from throughout the country, and the Equal Employment

Opportunity Commission ("EEOC") as plaintiff-intervenor, who collectively asserted that IDS Financial Services, Inc., IDS Life Insurance Company, and IDS Financial Corporation (collectively, "IDS") had violated the ADEA. Record at 478-506 (*Glass v. IDS Fin. Servs., Inc.*, 778 F. Supp. 1029 (D. Minn. 1991)).[1] Mr. Sinyard and the other class members were represented by Winthrop & Weinstine, P.A. ("class counsel") in these class action proceedings. *Id.* The class action lawsuits were subsequently resolved by virtue of a court-approved settlement that required IDS to pay a total of $35 million and to accept certain broad and sweeping injunctive relief to resolve all claims. *Id.* at 48-49, 384-420 & 425-434. From the settlement funds, IDS paid the Sinyards a total of $547,146. *Id.* at 24.[2]

Under the express statutory terms of the ADEA, employers are obligated to pay the employees' reasonable costs and attorneys' fees "in addition" to the employees' recovery of lost wages and benefits. Accordingly, the settlement proceeds also included attorneys' fees that IDS was statutorily obligated under the ADEA to pay directly

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[1] All references to the "Record" are contained in the Excerpts of Record filed with the United States Court of Appeals for the Ninth Circuit in this matter on or about January 4, 2000. This case was submitted to the Tax Court on a Stipulation of Facts. *Id.* at 26-67.

[2] The Sinyards and the Internal Revenue Service entered into a Stipulation concerning the taxation of the funds paid directly by IDS to the Sinyards, and the only unresolved issue is the includability of fees that had been paid by IDS to class counsel under the ADEA and pursuant to court order as taxable income to the Sinyards. *Id.* at 24-25.

to class counsel. *Id.* at 48-49, 51-52, 384-420, 421-423 & 425-455. Specifically, after review and approval by the District Court, IDS was directed to pay $252,608 for legal fees and costs directly to class counsel. *Id.* at 25, 51-55, 411-412, 421-424 & 435-455.

The Sinyards were residents of Alabama at the time of Mr. Sinyard's employment with IDS. The Sinyards continued to reside in Alabama at the commencement of the class action lawsuit; at the initiation of his participation in the class action lawsuit; and at the time he executed the initial fee agreement with counsel for the putative class. *Id.* at 538-548. Subsequently, while the class action was pending, Mr. Sinyard obtained employment in Georgia, and the Sinyards moved to Georgia. *Id.* at 186, 221, 269, 313, 507-513 & 539.[3] The Sinyards later moved again and were residents of Texas when the class action lawsuits were settled and the settlement proceeds

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[3] Attorneys' lien rights exist by statute under Alabama and Georgia law. *See* Ala. Stat. Ann. § 34-3-61(b); Ga. Stat. Ann. § 15-19-14(b). These attorneys' lien statutes in both states give rise to effectively identical rights because the Alabama attorneys' lien statute was drafted and enacted based on the Georgia attorneys' lien statute. *See Ex rel. Clanahan*, 72 So. 2d 833, 840 (Ala. 1954); *Fuller v. Lanett Bleaching Co.*, 65 So. 61, 61-62 (Ala. 1914). Alabama's attorneys' lien statute has long been interpreted as providing attorneys with an actual property right in the underlying cause of action, and income derived from that property right in the claim constitutes income that is taxable to counsel rather than the client. *Foster v. United States*, 249 F.3d 1275, 1279-81 (11th Cir. 2001) (applying Alabama law); *Davis v. Comm'r*, 210 F.3d 1346, 1357-58 (11th Cir. 2000) (same); *Cotnam v. Comm'r*, 263 F.2d 119, 125-26 (5th Cir. 1959) (same).

were paid to the class members and class counsel. *Id.* at 1 & 20.[4]

After the *IDS* class action had been fully resolved and dismissed, the Sinyards moved again in pursuit of employment, this time to Arizona. The Sinyards resided in Arizona when their Tax Court petition was filed. *Id.* at 1.

Although class counsel paid taxes on the attorneys' fees that were paid by IDS pursuant to IDS' legal obligation under the ADEA, the Commissioner nonetheless took the position that the payment of these fees and costs should also be treated as gross income to the Sinyards as well. *Id.* at 121-132.

The Tax Court adopted the Commissioner's position, in effect holding that the attorneys' fees paid directly to class counsel by IDS to satisfy IDS' statutory obligations under the ADEA and taxed as income to class counsel should also be treated as taxable income to the Sinyards. *Sinyard v. Comm'r*, T.C. Memo. 1998-364 (1998).

The Sinyards appealed the Tax Court's determination to the United States Court of Appeals for the Ninth Circuit. The Sinyards were residents of Arizona at the time they filed their petition in this matter. *Id.* at 1. Accordingly, the Ninth Circuit had jurisdiction over the

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[4] Attorneys' liens arising under Texas law have been interpreted to provide counsel with a property right in the underlying cause of action similar to the Alabama attorneys' lien statute, and the income derived therefrom has been treated as income to the attorney rather than the client. *Srivastava v. Comm'r*, 220 F.3d 353, 363-65 (5th Cir. 2000) (applying Texas law).

Sinyards' appeal from the Tax Court's decision. 26 U.S.C. § 7482(b)(1)(A).

The Ninth Circuit held the attorneys' fees paid by IDS directly to class counsel "were awarded by the court pursuant to the ADEA." *See* Order filed April 27, 2001. Two of the three judges on the panel nonetheless subsequently determined that the attorneys' fees constituted taxable income to the Sinyards, holding that the employee – rather than his/her counsel – is the real party in interest with respect to the attorneys' fees paid "in addition" to the compensatory damages recovered under the ADEA. *Sinyard v. Comm'r*, 268 F.3d 756, 759 (9th Cir. 2001). The majority further declined to adhere to decisions from the Fifth and Eleventh Circuits interpreting Alabama law on attorneys' liens, and instead it held that the payment of such fees constitutes income to the party rather than the attorney. *Id.* at 759-60.

The remaining judge on the panel dissented on the ground that taxation of the attorneys' fees on the employees conflicted with the plain statutory language and underlying statutory purpose of the ADEA. *Id.* at 760-62. The dissenting judge further pointed out that, aside from the ADEA, the Ninth Circuit had previously ruled that the applicable state law controls and, therefore, required the application of attorneys' lien rights under Alabama law, which would give rise to an interest taxable only to counsel. *Id.* at 761 & n.1 (citing *Benci-Woodward v. Comm'r*, 219 F.3d 941, 942 (9th Cir. 2000), *cert. denied*, 531

U.S. 1112 (2001); *Coady v. Comm'r*, 213 F.3d 1187, 1190 (9th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001)).

REASONS FOR GRANTING THE PETITION

I. THE TAXATION OF ATTORNEYS' FEES RECOVERED IN LITIGATION SHOULD BE DETERMINED BY A UNIFORM STANDARD THAT APPLIES EQUALLY TO ALL TAXPAYERS IN EVERY CASE RATHER THAN VARYING AND UNEQUAL TREATMENT DEPENDING UPON THE DISPARATE APPLICATION OF STATE LAW.

"There is a split among the Courts of Appeals" as to whether attorneys' fees paid to counsel from funds recovered in litigation constitute taxable income to clients. *Banaitis v. Comm'r*, T.C. Memo. 2002-5, 2002 WL 22018, at *5 (2002). Rather than applying a national and uniform rule based on federal law, the federal income taxation of attorneys' fees recovered in litigation now varies from case to case depending upon the attorneys' lien rights arising under the applicable state's law and the manner in which the particular Court of Appeals may interpret that state's law. *Kenseth v. Comm'r*, 114 T.C. 399, 432 (2000) (Beghe, J., dissenting). As a result, taxpayers are treated differently depending upon the state law that is applied and the particular court in which their case is decided.

The Fifth, Sixth, and Eleventh Circuits have interpreted attorneys' lien rights arising under Alabama, Texas, and Michigan law to give counsel a property interest in the claim upon which recovery is obtained and, therefore, have construed the income derived and paid directly to counsel from that interest to be taxable to the

attorney only. *See, e.g., Foster v. United States*, 249 F.3d 1275, 1279-81 (11th Cir. 2001) (applying Alabama law); *Estate of Clarks v. United States*, 202 F.3d 854, 856-58 (6th Cir. 2000) (applying Michigan law); *Davis v. Comm'r*, 210 F.3d 1346, 1357-58 (11th Cir. 2000) (applying Alabama law); *Srivastava v. Comm'r*, 220 F.3d 353, 363-65 (5th Cir. 2000) (applying Texas law); *Cotnam v. Comm'r*, 263 F.2d 119, 125-26 (5th Cir. 1959) (applying Alabama law). These circuits have viewed the payment of attorneys' fees from the recovery on such claims as a "division of property" owned jointly by the client and counsel. *Clarks*, 202 F. 3d at 857.

In contrast, the First, Third, Fourth, Seventh, Ninth, Tenth, and Federal Circuits have interpreted attorneys' lien rights arising under the laws of various other states as providing counsel with only a security interest – rather than a property interest – and view attorneys' fees paid from the recovery of the underlying claim as an assignment of income by the client to his/her counsel. Under this view, the recovery of attorneys' fees is treated as taxable income to the clients as well as to their counsel even where payment is made directly by the opposing party to the attorney. *See, e.g., Campbell v. Comm'r*, 274 F.3d 1312, 1314-15 (10th Cir. 2001) (applying Missouri law); *Kenseth v. Comm'r*, 259 F.3d 881, 883-85 (7th Cir. 2001) (applying Wisconsin law); *Young v. Comm'r*, 240 F.3d 369, 376-79 (4th Cir. 2001) (applying North Carolina law); *Benci-Woodward*, 219 F.3d at 943-44 (applying California law); *Coady*, 213 F.3d at 1190-91 (applying Alaska law); *Baylin v. Md.*, 43 F.3d 1451, 1454-55 (Fed. Cir. 1995) (applying Maryland law); *Alexander v. Comm'r*, 72 F.3d 938, 944-46 (1st Cir. 1995) (applying Massachusetts law);

O'Brien v. Comm'r, 319 F.2d 532, 532 (3d Cir. 1963), *cert. denied*, 375 U.S. 931 (1963) (applying Pennsylvania law).

The lack of uniformity created by differences among the various states' law concerning attorneys' liens is compounded by differences in the way individual Courts of Appeals interpret the same state's law.

The instant case provides an unfortunate illustration of the disparate treatment of taxpayers that has resulted from this split among the circuits. During the relevant periods of time leading up to the underlying class action, and during the pendency of the class action itself, the Sinyards resided in Alabama, Georgia, and, eventually, Texas. However, after the underlying case against IDS had been fully resolved, and after IDS had paid the class members and class counsel pursuant to the order of the court and the statutory terms of the ADEA, the Sinyards moved to yet another state in pursuit of employment for Mr. Sinyard. The Tax Court ignored the Sinyards' residence in Alabama, Georgia, and Texas during the relevant time frames, and instead it applied Arizona law to determine the attorneys' lien issue. *Sinyard v. Comm'r*, T.C. Memo. 1998-364 (1998). Thereafter, it was the fortuity of the Sinyards' move to Arizona after-the-fact that caused the appeal from the Tax Court decision to be presented to the United States Court of Appeals for the Ninth Circuit, rather than to the Fifth or Eleventh Circuits wherein the Sinyards had previously resided throughout all of the events of the underlying litigation, throughout the course of the litigation, and at the time the case was settled and IDS made their payments.

If the instant case had been decided by the Fifth or Eleventh Circuits under Alabama's attorneys' lien statute, the attorneys' fees would not have been taxable to the Sinyards. *See Foster*, 249 F.3d at 1279-81 (applying Alabama law); *Davis*, 210 F.3d at 1357-58 (same); *Cotnam*, 263 F.2d 125-26 (same). The result would have presumably been the same in the Fifth or Eleventh Circuits if Georgia law were applied because the Alabama statute is based on the Georgia attorneys' lien statute. *Compare* Ala. Stat. Ann. § 34-3-61(b) *with* Ga. Stat. Ann. § 15-19-14(b). *See also Clanahan*, 72 So.2d at 840; *Fuller*, 65 So. at 61-62.[5] Likewise, if the case had been decided by the Fifth Circuit under Texas law – where the Sinyards were residing when the case was settled, the settlement proceeds were paid and distributed, and their tax returns were filed – the attorneys' fees would not have been taxable to the Sinyards. *See Srivastava*, 220 F.3d at 363-65 (applying Texas law).

The only connection that the State of Arizona had to this case was that the Sinyards resided in Arizona when they filed their Tax Court petition to challenge the Commissioner's decision on their 1992 tax year. Due to the split on this tax issue between the Ninth and the Fifth and Eleventh Circuits, it is the fortuity of this move after

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[5] "The Alabama statute was adopted from and is virtually identical to Georgia's charging lien statute." Thad Austin Davis, *Cotnam v. Commissioner And The Income Tax Treatment Of Contingency-Based Attorneys' Fees – The Alabama Attorney's Charging Lien Meets Lucas v. Earl Head-On*, 51 Ala. L. Rev. 1683, 1714 (2000). Due to this "common heritage" and nearly identical language, the statutes would be interpreted and applied in the same manner. *Id.*

the completion of the underlying case that led to the double taxation of attorneys' fees for the Sinyards. If the Sinyards had been able to remain in Alabama, Georgia, or even Texas, the result would presumably have been different because the Tax Court would have been required to follow the precedent of the Eleventh or Fifth Circuits on this issue. *See Dickerson v. Comm'r*, T.C. Memo. 2001-53, 2001 WL 233961, at *2 n.3 (2001) (*Golsen* rule requires Tax Court to apply the law of the circuit to which a case is appealable) (citing *Golsen v. Comm'r*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971)). The personal circumstances of the Sinyards therefore underscore the irrational result that can occur from the split of the circuits on the application of federal income taxation to the issue of the taxation of attorneys' fees.

The Ninth Circuit's majority recognized that Mr. Sinyard was a resident of Alabama when he became involved with the class action in the underlying matter, and it acknowledged that other federal circuits had previously interpreted Alabama law to hold that attorneys' fees recovered in litigation belonged to the attorney and, therefore, could not be construed as taxable income to the party. *Sinyard*, 268 F.3d at 759-60. The Ninth Circuit's majority nonetheless "declined" to apply Alabama law as interpreted by the Fifth and Eleventh Circuits and, instead, held that the attorneys' fees were properly treated as taxable income to the Sinyards. *Id.*

Because there is no uniform or national standard rule that now applies to whether attorneys' fees may be treated as gross income under federal tax law – even for the payment of attorneys' fees pursuant to the remedy provisions of a federal statute – the determination of

whether the recovery of attorneys' fees are taxable to a party will vary considerably due to the fortuity of the applicable state law and differences in the particular circuit court that interprets and applies that state's law (even when the same state law may apply with respect to the attorneys' lien rights). This Court should establish a standard and uniform rule that will apply fairly and equally to each taxpayer in all cases regardless of the applicable attorneys' lien rights arising under the law of a particular state and regardless of a particular circuit's views concerning the interpretation of that state's law.

II. THE COURTS OF APPEALS ARE SPLIT WITH REGARD TO THE MANNER IN WHICH THE ASSIGNMENT OF INCOME DOCTRINE SHOULD APPLY TO THE RECOVERY OF ATTORNEYS' FEES IN LITIGATION.

The current conflict that exists among the Courts of Appeals – and the reason that state law controls the treatment of attorneys' fees under federal tax law – arises from a difference in the interpretation and application of the assignment of income doctrine. The assignment of income doctrine arises from the principle that the party who originally owns the right to the source of income shall be the party who is taxed on that income. This is true even when the source of income is assigned away and the income is paid at a later date. This Court long ago held that gifts constituting anticipatory assignments of income will not relieve the assignor of the tax liability on income subsequently derived from the property or interest that has been the subject of the assignment. *Helvering*

v. Horst, 311 U.S. 112 (1940); *Lucas v. Earl*, 281 U.S. 111 (1930).

In attempting to apply the judicially-created assignment of interest doctrine articulated by this Court in *Lucas* and *Horst*, the circuit courts have disagreed as to whether the payment of attorneys' fees with funds recovered from the opposing party in litigation constitutes a division of property created through the joint efforts and contributions, and therefore jointly owned by and between, the client and counsel or, alternatively, whether the attorneys' fees constitute an anticipatory assignment of a right of income from property owned exclusively by the client. *See* B. Douglas Smith, *Ethel Cotnam's Ghost: The Conflicting Tax Treatment Of Contingent Attorneys' Fees: Srivastava v. Commissioner*, 54 Tax Law. 437, 441-444 (2001) (discussing circuit split concerning assignment of income doctrine); Mathew A. Melone, *Roundup of Tax Developments From The Year That Was*, 66 Prac. Tax Strategies 25, 25-26 (2001) (same); Lauren E. Sheridan, *Trees In The Orchard Or Fruit From the Trees?: The Case For Excluding Attorneys' Contingent Fees From The Client's Gross Income*, 36 Ga. L. Rev. 283, 297-305 (2001) (same); Davis, *supra*, 51 Ala. L. Rev. at 1709-1713 (same).

The Fifth, Sixth, and Eleventh Circuits have held that attorneys' fees paid with funds recovered from the opposing parties do not constitute assignments of income and are, therefore, taxable only to the attorneys who are compensated and not to their clients. *See, e.g., Foster*, 249 F.3d at 1279-81; *Clarks*, 202 F.3d at 857-58; *Davis*, 210 F.3d at 1347-48; *Srivastava*, 220 F.3d at 363-65; *Cotnam*, 263 F.2d at 125-26.

In contrast, the First, Third, Seventh, and Tenth Circuits have held that attorneys' fees paid from funds recovered in litigation from opposing parties constitute assignments of income by clients to their counsel and, consequently, are taxable to both the parties as well as their attorneys. *See, e.g., Campbell*, 274 F.3d at 1314; *Kenseth*, 259 F.3d at 883-85; *Young*, 240 F.3d at 376-79; *Alexander*, 72 F.3d at 944-46; *O'Brien*, 319 F.2d at 532.

The same split that divides the circuit courts on this issue likewise divides the United States Tax Court in their interpretation of the assignment of interest doctrine. *See Kenseth*, 114 T.C. at 417 & 421 (eight judges joined majority; five judges joined dissent; three judges did not participate). Rather than applying a broad-gauged principle that can be fairly and consistently applied to taxpayers equally in every case, the lack of clarification of this aspect of "the Federal common law of taxation as adopted by the Supreme Court" has instead resulted in a situation where the Tax Court and the Courts of Appeals have "been beguiled by 'attenuated subtleties' and 'refinements' into treating the problem as one of determining the claimant's retained legal rights in his cause of action under State law." *Id.* at 432.

As a result of this inconsistent application of the assignment of interest doctrine, taxpayers receive dramatically different treatment depending upon which circuit court decides their appeal. *See, e.g.*, Sheridan, *supra*, 36 Ga. L. Rev. at 287 (comparing taxpayer-plaintiff in Seventh Circuit's decision in *Kenseth* who was forced to pay taxes of $55,037 on income he never received with taxpayer-plaintiff in Sixth Circuit's decision in *Clarks* who

was spared burden of paying an additional $254,298 in taxes on money his estate never received).

Because the assignment of income doctrine is "judge-made law," it presents a problem under the common law of federal income taxation that requires this Court's attention.

III. THE COMMISSIONER'S POLICY TO TAX EMPLOYEES ON ATTORNEYS' FEES PAID BY EMPLOYERS CONFLICTS WITH THE EXPRESS LANGUAGE AND UNDERMINES THE ESTABLISHED PURPOSES OF THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT.

Section 626(b) of the Age Discrimination in Employment Act incorporates the long-standing attorneys' fees provision contained in the Fair Labor Standards Act which states, in pertinent part, as follows: "The court in such action ***shall, in addition*** to any judgment awarded to the plaintiff or plaintiffs, ***allow a reasonable attorneys' fee to be paid by the defendant, and costs of the action.***" 29 U.S.C. §§ 216(b) & 626(b) (emphasis added). The legislative history of the ADEA demonstrates that Congress sought to incorporate the remedial provisions of the FLSA "to the greatest extent possible." *EEOC v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 882 n.10 (7th Cir. 1994), *cert. denied*, 513 U.S. 1198 (1955).

Congress' purpose underlying the FLSA attorneys' fee provision is to ensure that wronged employees receive their full wages and related compensation "without incurring any expense for legal fees or costs." *Maddrix v. Dize*, 153 F.2d 274, 275-76 (4th Cir. 1946). This

particular attorneys' fee provision was crafted with the intention "that an employee's recovery should be net, and that therefore the lawyer's compensation should come solely from the employer." *Skidmore v. John J. Casale, Inc.*, 160 F.2d 527, 531 (2d Cir.), *cert. denied*, 331 U.S. 812 (1947)). The plain and unambiguous statutory language mandates the conclusion that the attorneys' fees must be treated separately from the judgment itself so as to achieve the ADEA's longstanding "goal to 'make whole' persons who suffer loss due to discrimination." *Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)). *See also Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1562 (11th Cir. 1988) ("The purpose of the ADEA, insofar as the individual plaintiff is concerned is to make the plaintiff 'whole,' to restore the plaintiff to the economic position the plaintiff would have occupied but for the illegal discrimination of the employer.").

IDS' payment of attorneys' fees to class counsel pursuant to court order and in satisfaction of their statutory obligation to pay such fees does not give rise to a taxable benefit to the Sinyards. First, the fee provision in the ADEA constitutes the exclusive basis for payment of fees and supersedes any alternative fee arrangement by and between attorneys and their clients. *See, e.g., United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, Local No. 307 v. G&M Roofing Sheet Metal Co.*, 732 F.2d 495, 504 (6th Cir. 1985) (interpreting FSLA fee provision); *Harrington v. Empire Constr. Co.*, 167 F.2d 389, 392 (1948) (same). Second, under well settled law, a party's discharge of its own legal obligations and liabilities shall not be deemed to provide a third party taxpayer with

taxable income regardless of any benefit that third party is alleged to have received. *Tucker v. Comm'r*, 226 F.2d 177, 179 (8th Cir. 1955); *Stern v. Comm'r*, 137 F.2d 43, 45-46 (2d Cir. 1943); *Ruben v. Comm'r*, 97 F.2d 926, 928-29 (8th Cir. 1938).

The Ninth Circuit's two-judge majority held that, "[u]nder the ADEA, attorney's fees are available to prevailing plaintiffs, not to plaintiff's counsel," and therefore attorneys' fees paid under the ADEA are taxable to the Sinyards rather than their counsel. *Sinyard*, 268 F.3d at 759. In contrast, the dissenting member of the panel viewed such a holding to be "at odds with the [ADEA's] express statutory authority, which provides that the attorney's fee award is 'in addition' to the plaintiff's recovery, and with the intent of the statute, which is to make the plaintiff whole." *Id.* at 760-62.

There is a material distinction between attorneys' fees that are awarded from the damages recovered by the party as compared to attorneys' fees awarded "in addition" to any damages recovered by the party. *Marré v. United States*, 117 F.3d 297, 304-05 (5th Cir. 1997) (citations omitted). In the latter circumstance, "the attorneys' fees are not awarded out of the prevailing party's damages, but rather are awarded on top of any damages the prevailing party receives." *Id.* at 304 (citations omitted). Payment of fees in this manner "does not involve derivative rights of the attorneys to the fees." *Id.* at 305. The recovery of damages and attorneys' fees are instead entirely "separate awards" with "the former going to the prevailing party and the latter going to the prevailing party's attorneys." *Id.* at 304. "[T]he prevailing party is only nominally the person who receives the award; the real

party-in-interest vis-à-vis attorneys' fees awarded under the statute are the attorneys themselves." *Id. See also United States v. Smith,* 55 F. Supp. 2d 917, 920 (N.D. Ind. 1999) (attorney is real party-in-interest with respect to attorneys' fees awarded in addition to the prevailing party's damage recovery).

Because attorneys' fees awarded under the ADEA are attorneys' fees that employers have a statutory obligation to pay, the real parties-in-interest with regard to the payment of those fees are necessarily the attorneys to whom the compensation is to be paid rather than the employees. Moreover, the fact that the employers' satisfaction of this statutorily imposed obligation may have some benefit to employees does not transform the payment of these attorneys' fees into taxable income to the employees. *Sinyard,* 268 F.3d at 762 (McKeown, J., dissenting) (distinguishing *Old Colony Trust Co. v. Comm'r,* 279 U.S. 716 (1929)).

The fact that the plain statutory language incorporated in the ADEA expressly requires that the attorneys' fees are to be paid "in addition" to any judgment awarded to the employees places the ADEA fee provision in a unique category of fee provisions.[6] The ADEA

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[6] The False Claims Act provides another example of such a statute. 31 U.S.C. § 3730(d) (permitting recovery of "an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant."). *See, e.g., Virani v. Jerry M. Lewis Truck Parts & Equip., Inc.,* 89 F.3d 574, 577-79 (9th Cir. 1996), *cert. denied,* 519 U.S. 1109 (1997) (attorney's independent right to recover statutorily mandated fees to be paid "in addition" to plaintiff's

imposes a statutory obligation on employers to pay attorneys' fees to counsel for employees, and the ADEA employees' attorneys have a right to the payment of those attorneys' fees that exists separately and apart from the rights of employees. In short, it is the employee's attorney – not the employee – who is the real party-in-interest with regard to the payment of attorneys' fees under the ADEA.

It is imperative that this Court ensure the proper application of this fee provision in the FLSA, the ADEA, and the analogous fee provisions in a manner consistent with the express requirements and objectives set out by Congress. Given that the ADEA incorporates the FLSA's long-standing fee provision as well as a type of fee provision similar to provisions that can be found in other federal statutes, *see, e.g., supra* note 6, this case involves an important and broadly applicable issue that must be resolved by this Court. Moreover, the Commissioner's current policy of taxing both the attorney and the ADEA plaintiff on the same payment of fees by the defendant to the attorney contradicts and undercuts the ADEA's remedial purpose of making the aggrieved party "whole."

If a victim of age discrimination is to be taxed by the Commissioner on fees that he/she did not receive, and had no right to receive, then that person may be worse off then he/she would have been if relief had never been sought under the ADEA. This unfortunate result may be even more likely to occur if a person, such as Mr. Sinyard,

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recovery is "no longer questioned in federal courts" and, therefore, the fees "must be directed to the attorney.").

joins in an ADEA class action with other similarly situated persons, even though the ADEA statute encourages collective actions in order to lower costs for individual victims. *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 171 (1989) ("A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources."). The Sinyards respectfully submit that this Court should reconcile the incongruity of the Commissioner's current taxation policy regarding fees paid under the ADEA with the statutory language of the ADEA.

CONCLUSION

The Sinyards respectfully request the Court to issue a Writ of Certiorari to review the Ninth Circuit's decision in this case so as to resolve the existing split among the circuits that has resulted in the unequal treatment of taxpayers due to the application of state law rather than a uniform federal rule; clarify the judicially created assignment of income doctrine; and ensure the correct application of federal statutes such as the ADEA.

Dated: March 15, 2002

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES T. SINYARD; MONIQUE T. SINYARD, *Petitioners-Appellants,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellee.*	No. 99-71369 Tax Ct. No. 11056-96 OPINION

Appeal from a Decision of the
United States Tax Court
Stephen J. Swift, Tax Court Judge, Presiding

Argued and Submitted
March 16, 2001 – San Francisco, California

Filed September 25, 2001

Before: John T. Noonan, M. Margaret McKeown, and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Noonan;
Dissent by Judge McKeown

COUNSEL

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Paula M. Junghans, Richard Farber, and Kenneth W. Rosenberg, United States Department of Justice, Tax Division, Washington, D.C., for the respondent.

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OPINION

NOONAN, Circuit Judge:

James T. Sinyard and his wife Monique T. Sinyard (the Sinyards) appeal the judgment of the Tax Court determining a deficiency in their income tax for the taxable year 1992. At issue is the taxpayer's liability for attorneys' fees paid pursuant to court order approving the settlement of two class actions brought under the Age Discrimination in Employment Act (the ADEA), 29 U.S.C. § 621 et seq. Holding that such fees paid on the taxpayer's behalf are income to the taxpayer, we affirm the judgment of the Tax Court.

FACTS

In the 1980's James Sinyard was the division manager in Mobile, Alabama of IDS-Financial Services, Inc. (IDS). In 1987, at the age of 49, he was allegedly forced to resign. In March 1989, Sinyard joined two class action suits against IDS alleging age discrimination and other torts. Sinyard entered into an agreement with class action counsel, Winthrop & Weinstine, providing: "In the event of a recovery, Winthrop & Weinstine will be paid one third (1/3) of the amount you obtain in the lawsuit, whether by settlement or jury award."

In April 1990, the Equal Employment Opportunity Commission (the EEOC) intervened. In 1992, the suits were settled. IDS agreed to pay $35 million "in full and complete settlement of all claims as described in this Agreement and the exhibits hereto"; the payment was to be made "to the 32 individual plaintiffs, Mervyn Taylor, and Winthrop & Weinstine, P.A., their attorneys." After deducting costs and disbursements of $1.7 million the 32 individual plaintiffs agreed to allocate one-third of the remaining total settlement amount as compensation for tort injuries to the plaintiffs, to allocate one-third of the settlement amount as compensation for lost wages, and to "allocate one-third of the settlement amount for payment of attorneys' fees pursuant to 29 U.S.C. § 626(b) and 29 U.S.C. § 216(b)." IDS agreed to pay the attorneys' fees plus amounts allocated to legal costs and disbursements "directly to Winthrop & Weinstine, P.A., or to an account designated by them." IDS agreed to withhold federal and state income taxes on the one-third of the settlement which was allocated as compensation for lost wages.

IDS also agreed to undertake various measures to ensure its compliance with the ADEA, such as training sessions for all managers and supervisors, and to make regular reports to the EEOC as to any division manager who resigned, retired, had been demoted or had been terminated. IDS agreed to instruct all IDS personnel about the importance of avoiding age discrimination and, in particular, to avoid the use of such code words as "new blood" or "young turks" on the one hand, or "over the hill" or "behind the times," on the other. The settlement agreement was contingent upon approval by the court.

On August 26, 1992, the federal district court in which the suits were pending approved the settlement and issued the order drafted by the parties allocating one-third of the settlement to "attorneys' fees recoverable pursuant to 29 U.S.C. § 626(b) and 29 U.S.C. § 216(b)," to be paid directly without withholding for taxes, to Winthrop & Weinstine.

In accordance with the settlement, the proceeds were allocated as follows:

Total settlement payment	$35,000,000
Less costs and disbursements	$1,500,000
Net settlement proceeds	$33,500,000

Allocation of net settlement proceeds:

Attorneys' fees (1/3)	$11,166,666.65
Tort damages	$12,616,666.70
Lost wages	$11,166,666.65

IDS issued a single check to Winthrop & Weinstine for $23,783,333.35, the sum of the tort damages and the attorneys' fees. The check was deposited in a trust account on behalf of the class action plaintiffs.

PROCEEDINGS

The Commissioner of Internal Revenue assessed a deficiency in the Sinyards' 1992 tax return. They petitioned the Tax Court to deny the deficiency. The case was tried on stipulated facts. October 7, 1998 the Tax Court sustained the Commissioner, holding that payment of a portion of the legal fees to Winthrop & Weinstine had satisfied an obligation of James Sinyard.

The amount received in settlement by him that is not now in dispute was as follows:

$273,573	taxable back wages
164,144	taxable tort damages
109,429	nontaxable personal injury damages
$547,146	

In addition, legal fees and costs of $63,152 were allocated to the nontaxed personal injury damages and by agreement with the Commissioner excluded from income.

The Commissioner maintains that $252,608 in attorneys' fees should be treated as income to the Sinyards. The Commissioner held this amount allowable as a miscellaneous itemized deduction. This deduction was reduced by 2% of Adjusted Gross Income, leaving a deduction of $240,984 for the attorneys' fees. The full amount of this deduction could not be taken because the Sinyards' income was subject to the Alternative Minimum Tax (the AMT). The result was the deficiency upheld by the Tax Court.

The Sinyards appeal.

ANALYSIS

[1] If A owes B a debt, and C pays the debt on A's behalf, it is elementary that C's payment is income to A as well as to B. Here, James Sinyard had contracted to pay Winthrop & Weinstine one-third of what he might receive in settlement. His obligation to the law firm was satisfied by IDS. The payment was therefore income to him. "The discharge by a third person of an obligation to him is

equivalent to receipt by the person taxed." *Old Colony Trust Co. v. Commissioner,* 279 U.S. 716, 729 (1929).

The Sinyards maintain their case is different. It is one where A owes B but C is liable to B for the same debt and indeed is primarily liable. When C satisfies his obligation to B, C's payment arguably should not be treated as income to A. In the present case, IDS became liable to pay the attorneys' fees. It did so by virtue of the order of the court confirming the settlement and ordering IDS to perform according to its terms. IDS became primarily liable for the debt to Winthrop & Weinstine. When IDS discharged the debt it was bound to pay, the Sinyards say they received no income.

The Sinyards have scoured the reports to find cases supporting their contention. What they have found, for example, are a corporation's arrangement to make payments to preserve its franchise, *Tucker v. Commissioner,* 226 F.2d 177 (8th Cir. 1955); a trust in lieu of alimony, *Stern v. Commissioner,* 137 F.2d 43 (2d Cir. 1943); and a corporation's settlement of a suit also affecting the taxpayer, *Ruben v. Commissioner,* 97 F.2d 926 (8th Cir. 1938). These cases rest on facts peculiar to themselves, in contexts very different from that provided by a fee-shifting statute. Although, as the Sinyards note, there are several hundred such statutes enacted by Congress, they present no precedent where the shift of the obligation to pay the lawyer from the lawyer's client to the defendant has relieved the client from the constructive receipt of income when his obligation to the lawyer is satisfied.

[2] Indeed, the Sinyards' arguments are contrary to prior case law and the plain language of the ADEA

statute. Under the ADEA, attorney's fees are available to prevailing plaintiffs, not to plaintiff's counsel. 29 U.S.C. § 626(b) (expressly incorporating provisions pertaining to attorney's fees under the Fair Labor Standards Act, 29 U.S.C. § 216(b)); *see Evans v. Jeff D.*, 475 U.S. 717, 730-32 (1986) (holding that while Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights, it did not bestow fee awards upon attorneys). As the Supreme Court held in a civil rights case brought under 42 U.S.C. § 1988, "it is the party, rather than the lawyer" who is eligible for fees under the fee-shifting statute. *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990); *Gilbrook v. City of Westminster*, 177 F.3d 839, 874-75 (9th Cir. 1999) (recognizing that fee awards belong to the prevailing party under civil rights statute, 42 U.S.C. § 1988); *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1357 (9th Cir. 1998) (holding that attorney fees awarded under the Clayton Act should be paid to the successful party itself).

[3] In our case, the Sinyards bound themselves to pay Winthrop & Weinstine one-third of what they received. When IDS satisfied this obligation, the Sinyards were so much the richer. That they never laid hands on the money paid to the lawyers does not obliterate their constructive receipt. The Sinyards are therefore liable for the deficiency resulting from the workings of the AMT. *Benci-Woodward v. Commissioner*, 219 F.3d 941 (9th Cir. 2000), *cert denied*, 531 U.S. 1112 (2001); *Coady v. Commissioner*, 213 F.3d 1187 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1604 (2001).

The Sinyards suggest that the ADEA is different from many fee-shifting statutes. The legislative history of the ADEA shows an intent to make the plaintiffs whole. The

Fair Labor Standards Act remedy incorporated into the ADEA requires a judgment for the plaintiff to provide for attorneys' fees "in addition" to damages. 29 U.S.C. § 216(b).

[4] These observations do not alter the analysis of the tax law. The ADEA does make the injured plaintiff whole. The attorneys' fees are in addition to compensation for what he lost. The tax impact of the attorneys' fees arises from the Alternative Minimum Tax. Without its limitation, the attorneys' fees would be income to the Sinyards, and the income would be wiped out by deduction of the total received. It would be a wash. The anomalous result, no doubt unintended, arises when part of the deduction is blocked by the AMT. We do not think we can change the basic rules of income tax in order to correct this result. *See Benci-Woodward,* 219 F.3d at 944.

The Sinyards have two fallback arguments. The first is that James Sinyard was a resident of Alabama when he made the contract with the law firm. Under Alabama law a contingent fee agreement establishes a lawyer's lien on the recovery, and the fee has been held to be not income to the taxpayer. *Cotnam v. Commissioner,* 263 F.2d 119, 125 (5th Cir. 1959). We do not dispute the old Fifth Circuit's statement of Alabama law, but we do not see how the existence of a lien in favor of the taxpayer's creditor makes the satisfaction of the debt any less income to the taxpayer whose obligation is satisfied. Like the Tax Court, we decline to follow *Cotnam.*

The Sinyards' second argument is the settlement achieved more than money damages from the individual plaintiffs. As private attorneys general the plaintiffs

reformed the practice and culture of IDS. The lion's share of the lawsuit was work done by the counsel they brought into the case. Hence, some of the attorneys' fees should not be allocated to the individual plaintiffs. The argument has two weaknesses. First, it ignores the EEOC's part in the settlement. Second, the contract between Sinyard and the law firm makes him liable for one-third of the fees without regard to what else beyond monetary damages is achieved.

It is possible that where monetary recovery is little or nonexistent in an ADEA case, the attorneys' fee award would leave the taxpayer owing more tax than anything he received in his ADEA suit. This is not the Sinyards' case. The remedy for such unfairness when it does occur lies with Congress specifically exempting ADEA damages as it has exempted personal injury damages; or the whole issue could be avoided by Congress redesigning the computation of the AMT to permit the full deduction of attorneys' fees.

For the foregoing reasons, the judgment of the Tax Court is AFFIRMED.

McKEOWN, Circuit Judge, dissenting:

The majority concludes that a statutory attorney's fee, awarded by the district court to the Sinyards' attorney under the fee-shifting provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, is taxable to the Sinyards as income. This unfortunate result appears to be at odds with the express statutory language, which provides that the attorney's fee award is "in addition" to the plaintiff's recovery, and with the

intent of the statute, which is to make the plaintiff whole. Because the majority's conclusion fails to account for the effect of the ADEA's fee-shifting provision, I respectfully dissent.

I. The Effect of the ADEA

In my view, the issue is resolved by interpretation and application of the statute. The analysis starts and ends with the language of the ADEA. The ADEA incorporates the fee-shifting provision of the Fair Labor Standards Act, *see* 29 U.S.C. § 626(b), which states that "[t]he court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant," *id.* § 216(b).

In this case, as we previously determined, "the attorney's fees paid in settlement of the Sinyards' lawsuit were awarded by the court pursuant to the ADEA." *Sinyard v. Commissioner,* No. 99-71369 (Apr. 27, 2001) (order). That is to say, the fee obligation arose by operation of the fee-shifting statute itself; the fees were not part of a settlement, nor were they simply a percentage of a judgment. In this respect, the case before us differs from the cases that we have previously decided. In those cases, we were faced with a settlement agreement or a judgment in favor of the plaintiff, a portion of which the plaintiff then paid to the attorney pursuant to a contingent-fee agreement. *See, e.g., Benci-Woodward v. Commissioner,* 219 F.3d 941 (9th Cir. 2000) (punitive damages award and contingency fee agreement); *Coady v. Commissioner,* 213 F.3d 1187 (9th Cir. 2000) (wrongful termination judgment following bench trial and contingency fee agreement); *see*

also Kenseth v. Commissioner, ___ F.3d ___, 2001 WL 881479, at *1 (7th Cir. 2001) (settlement in age discrimination suit and contingency fee agreement). Under the circumstances of these cases, the plaintiff has received income (the judgment or settlement), the entire amount of which – including the portion paid to the attorney – is taxable to the plaintiff.

In contrast to attorney's fees paid pursuant to a contingent fee, which we have previously held to be governed by state law,[1] we are guided here by the text of the ADEA. The statute provides for two separate forms of recovery. First, there is the "judgment awarded to the plaintiff or plaintiffs." 29 U.S.C. § 216(b). Separate, and "in addition to" the plaintiff's recovery, "[t]he court . . . shall . . . allow a reasonable attorney's fee to be paid

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[1] On this point, the majority and I disagree. The majority appears to conclude that state law is irrelevant to the taxability of a contractually-determined attorney's fee. Majority Op. at 13743. Our precedents clearly rely on the operation of state law to determine the tax treatment of that portion of the judgment ultimately paid to the attorney. *See Benci-Woodward*, 219 F.3d at 942 ("The question before us is whether the taxpayers may exclude from gross income the portion of a punitive damages award retained by their attorney pursuant to a contingent fee agreement. The answer is no and is dictated by our recent case of *Coady*. . . . Although *Coady* involved analysis of an attorney lien under Alaska law, the result is the same under California law."); *see also id.* at 943 ("In light of California law. . . . "); *Coady*, 213 F.3d at 1190 ("This case is unlike *Cotnam [v. Commissioner*, 263 F.2d 119 (5th Cir. 1959)] and [*Estate of Clarks v. United States*, 202 F.3d 854 (6th Cir. 2000)] because *under Alaska law*, attorneys do not have a superior lien or ownership interest in the cause of action as they do in Alabama and Michigan. . . . " (emphasis added)).

by the defendant." *Id.* So under the statute, the attorney's fees are treated separately from the judgment itself.[2] This approach is consistent with the ADEA's design to ensure that the prevailing party is "made whole." Under the FLSA, "Congress intended that the wronged employee should receive his full wages plus the penalty without incurring any expense for legal fees or costs." *Maddrix v. Dize*, 153 F.2d 274 (4th Cir. 1946).

Moreover, those fees are a mandatory obligation, *id.* ("[t]he court . . . *shall* . . . allow" (emphasis added)), which the statute has imposed directly upon the defendant. The defendant itself must pay the plaintiff's attorney's fees, regardless of any obligation that the plaintiff may have to his attorney. Consequently, the defendant's payment of the fees discharges a statutory, not a contractual, burden.

Thus, it is mistaken to describe this as a situation in which "A [the plaintiff] owes B [her attorney] a debt, and C [the defendant] pays the debt on A's behalf." Majority Op. at 13741. If that were an accurate description, the

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[2] In relying on this statutory language, I express no opinion on the appropriate tax treatment of attorney's fees awarded under the slightly different language of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988(b). Although that statute specifies that attorney's fees are to be awarded to "the prevailing party," and although in other contexts the Supreme Court has suggested that it is the prevailing party who retains control over fees awarded pursuant to § 1988, see *Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990); *Evans v. Jeff D.*, 475 U.S. 717, 730-31 (1986), that statute is not before us here. Indeed, those cases addressing § 1988 were decided in a different context – namely, client control over the resolution of a case.

majority is of course correct that the payment from defendant C to attorney B would be taxable to plaintiff A as income. *Lucas v. Earl*, 281 U.S. 111 (1930). Here, defendant C does not satisfy a debt on behalf of plaintiff A; rather, C satisfies its own statutory obligation, imposed by the ADEA.

Indeed, the FLSA-based award is the exclusive basis for fees and supercedes alternative fee arrangements. *See United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n. Local No. 307 v. G & M Roofing Sheet Metal Co.*, 732 F.2d 495, 504 (6th Cir. 1984) ("The fact that the plaintiff has entered into an agreement with the lawyers prosecuting the case does not impact on the statutory burden of the employer. . . . "). In this sense, then, the Sinyards are quite right that their case is distinguishable from *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1929). In that venerable case, the Supreme Court considered the tax plight of the estate of William Wood, the president of the American Woolen Company. As part of Wood's compensation, the Company had paid the income tax due on Wood's salary. *Id.* at 720. The question presented was whether these income tax payments also constituted income to Wood. The Court held that they were taxable income. Reasoning that "[t]he payment of the tax by the employers was in consideration of the services rendered by the employee," the Court therefore held it to be "immaterial that the taxes were directly paid over to the government" and famously concluded that "[t]he discharge by a third person of an obligation to him is equivalent to receipt by the person taxed." *Id.* at 729.

Here, by contrast, IDS Financial Services (the defendant in the Sinyards' age discrimination suits) did not

receive consideration in exchange for paying the Sinyards' attorneys. Had it done so, then the situation might be different: We would interpret the contract (that is, the settlement agreement) between the Sinyards and IDS; determine whether the Sinyards' attorneys already had a stake in the funds paid by IDS; and consider the effect of the relevant state law, *see supra* note 1. But that is not the case before us. After the Sinyards and IDS settled their lawsuit, the district court taxed attorney's fees against IDS. When IDS paid those fees to the Sinyards' attorneys, IDS satisfied its own statutory obligation. *Old Colony* is inapposite.

Thus, I conclude that the attorney's fees awarded pursuant to the ADEA's fee-shifting provision are not taxable as income to the Sinyards.

II. The Equities

With that legal analysis resolved, I pause to note the inequitable result that befalls plaintiffs in certain of these cases. The taxation to a plaintiff of attorney's fees, combined with the operation of the Alternative Minimum Tax (AMT), sometimes leaves a victorious civil rights plaintiff with a net after-tax loss. For instance:

> If the ratio of attorney's fees to the entire recovery is high enough, a before-tax gain may metamorphose into an after-tax loss. In *Alexander v. Commissioner,* [72 F.3d 938 (1st Cir. 1995),] for example, the plaintiff settled a state law employment claim for $250,000 but incurred $245,000 in attorney's fees, for a pre-tax profit of $5,000. Under the AMT, the entire $250,000 recovery

> was taxable but none of the $245,000 in attorney's fees was deductible. If we assume that the taxpayer files jointly and has no other income, his AMT liability would be $53,900. Under these assumptions, the nondeductibility of the employee's attorney's fees under the AMT would convert a $5,000 before-tax gain into a $48,900 after-tax loss.

Laura Sager & Stephen Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 *S. Cal. L. Rev.* 1075, 1078 (2000) (footnotes omitted).

This Draconian result under the Tax Code can only undermine our civil rights laws. After all, the purpose of fee-shifting provisions, like the one in the ADEA, is not only to permit plaintiffs without resources to pursue claims but to encourage meritorious civil rights litigation by defraying its cost. But in an example like the one posited above, the "victorious" plaintiff would have been better off *without* the fee-shifting provision – and, indeed, better off if she had never filed her ultimately victorious suit. This result is surprising, to say the least. *See Alexander v. IRS*, 72 F.3d 938, 946 (1st Cir. 1995) ("We recognize that, because the amounts involved trigger the AMT and, thus, Taxpayer's deficiency, the outcome smacks of injustice because Taxpayer is effectively robbed of any benefit of the Legal Fee's below the line treatment."). Although I continue to believe that this anomaly must ultimately be resolved by Congress, *Benci-Woodward*, 219 F.3d at 944, it cries out for speedy resolution, particularly in view of the majority's position. Of course my view is that this case need not await statutory reform because the fees were awarded pursuant to the ADEA, not under state contract law.

III. Conclusion

For the foregoing reasons, I conclude that the attorney's fees awarded to the Sinyards' attorneys were not properly taxable as income to the Sinyards. Therefore, I would reverse.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES T. SINYARD; MONIQUE T. SINYARD, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 99-71369 Tax Court No. 11056-96 ORDER (Filed Apr. 27, 2001)

Before: NOONAN, MCKEOWN and WARDLOW, Circuit Judges

We hold that the attorney's fees paid in settlement of the Sinyards' lawsuit were awarded by the court pursuant to the ADEA.

The Commissioner is ordered to file brief (fifteen copies) not to exceed fifteen pages within forty-five days of the filing of this Order setting forth his position on whether attorney's fees awarded by the court in a class action suit under the ADEA should be taxed to the prevailing parties. The Sinyards are ordered to file a response brief (fifteen copies) within twenty days of the filing of the Commissioner's brief.

T.C. Memo. 1998-364

UNITED STATES TAX COURT

JAMES T. SINYARD AND MONIQUE T. SINYARD,
Petitioners *v.*
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 11056-96. Filed October 7, 1998.

David P. Pearson and *Paul W. Markwardt*, for petitioners.
Mary E. Dean, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

SWIFT, *Judge*: Respondent determined a deficiency in petitioners' Federal income tax for 1992 in the amount of $115,679.

The issue for decision is whether $252,608, among other funds, awarded in class action lawsuits is excludable from petitioner James T. Sinyard's income.

Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for 1992. References to petitioner are to James T. Sinyard.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. At the time the petition was filed, petitioners resided in Scottsdale, Arizona.

In 1989, petitioner joined two class action lawsuits pending in the U.S. District Court for the District of Minnesota (namely, *Glass v. IDS Fin. Servs., Inc.*, Civ. No. 4-89-76 (*Glass*), and *Stephens v. IDS Fin. Servs., Inc.*, Civ.

No. 4-89-115 (*Stephens*). The law firm of Winthrop and Weinstine represented the class plaintiffs.

In the original and amended complaints in *Glass* and in *Stephens*, it was alleged that IDS Financial Services, Inc., IDS Life Insurance Co., and IDS Financial Corp. (IDS): (1) Engaged in a pattern and practice of age discrimination against older division managers employed by IDS in violation of the Age Discrimination in Employment Act of 1967 (ADEA), Pub.L. 90-202, 81 Stat. 602, the Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. 93-406, 88 Stat. 829, and State law; (2) imposed illegal chargebacks against its division managers; and (3) intentionally inflicted emotional distress on certain of its employees; and relief was requested in the form of, among other things, punitive damages and attorney's fees.

At the time the classes closed in *Glass* and *Stephens*, a total of 32 class plaintiffs had joined in the lawsuits.

ADEA class actions generally constitute opt-in class actions and, after closure of the class, only plaintiffs who have already elected to do so may be part of the class. The *Glass* and *Stephens* actions both constituted opt-in class actions of which petitioner was an opt-in member.

The class plaintiffs in the *Glass* and *Stephens* actions, including petitioner, entered into contingency fee agreements with Winthrop and Weinstine under which it was provided that the class plaintiffs would be obligated to reimburse Winthrop and Weinstine for out-of-pocket expenses and to pay Winthrop and Weinstine attorney's fees on a contingency fee basis. The agreements provided that out-of-pocket expenses incurred during pendency of

the actions would be billed by Winthrop and Weinstine to the class plaintiffs on a monthly basis and fees due Winthrop and Weinstine under the contingency fee agreements would be billed at the conclusion of the actions.

Under the specific contingency fee agreement that petitioner herein entered into on September 18, 1989, with regard to payment of attorney's fees, it was provided, among other things, as follows:

> in the event of a recovery, Winthrop and Weinstine will be paid one-third (1/3) of the monetary amount obtained in the lawsuit, whether by settlement or jury award.

and

> In the event that an award of attorney's fees is received by you as a plaintiff, then that award will be considered as part of your total recovery with one-third of the amount to be paid to Winthrop and Weinstine and the remainder to be retained by you.

Under May 29, 1990, amendments to the contingency fee agreements, it was provided that the amount of attorney's fees would be "determined from the total monetary award actually received by each plaintiff."

Correspondence from Winthrop and Weinstine to class action plaintiffs dated October 2, 1989, stated:

> Any court-awarded attorney's fees would be part of your recovery from which the contingent fee will be calculated.

Correspondence from Winthrop and Weinstine to class action plaintiffs dated May 24, 1990, stated:

> There are also some other categories of damages asserted by all plaintiffs collectively. The first of these is attorney's fees. Whether proceeding on a contingent basis (as we are here) or on an hourly basis, the prevailing plaintiffs in an employment discrimination case are entitled to receive an award of attorney's fees.

and

> After considering these various matters, the Steering Committee has unanimously recommended to their fellow plaintiffs that attorney's fees, sanctions, costs and disbursements and similar awards which are not individualized to any particular plaintiff should be awarded equally on a pro rata basis to every plaintiff. For example, if the plaintiffs collectively receive a $3,200,000 award for attorney's fees for prevailing in the action, then each individual plaintiff would be entitled to $100,000 of that award.

During pendency of the *Glass* and *Stephens* class actions, Winthrop and Weinstine mailed routine billings to class members. These billings detailed the nature of out-of-pocket legal expenses incurred.

The amount of out-of-pocket expenses that, during the litigation, were billed, charged to, and paid by individual class plaintiffs varied depending on, among other things, financial circumstances of the individual plaintiffs.

During pendency of the class actions, petitioner paid $4,050 to Winthrop and Weinstine in reimbursement of out-of-pocket expenses incurred by Winthrop and Weinstine.

On or about April 16, 1990, a motion by the U.S. Equal Employment Opportunity Commission (EEOC) to intervene in the *Glass* and *Stephens* class actions was granted. Therein, EEOC sought a permanent injunction against IDS to prohibit IDS from engaging in any further discrimination against its employees on the basis of age. The EEOC also sought an order requiring IDS to institute and carry out policies, practices, and programs to provide equal opportunity for individual employees of IDS age 40 and older.

The injunctive relief sought by EEOC was prospective in nature and intended to benefit all employees of IDS including employees who were plaintiffs in the *Glass* and *Stephens* class actions. Intervention by EEOC in the *Glass* and *Stephens* class actions enhanced the merits of the class action lawsuits against IDS.

Legal services of Winthrop and Weinstine on behalf of the class action plaintiffs complemented the legal services of EEOC's attorneys, and vice versa.

On November 21, 1991, in the *Glass* and *Stephens* class actions, the District Court granted partial summary judgment in favor of IDS and against the class action plaintiffs dismissing certain breach of contract, ERISA, and tort claims made against IDS. Some of the legal services performed by Winthrop and Weinstine prior and subsequent to November 21, 1991, were attributable to the advancement of plaintiffs' contract and ERISA claims.

In early August of 1992, a comprehensive settlement in the *Glass* and *Stephens* class actions was entered into in which IDS agreed to pay $35 million to resolve all

remaining claims relating to the above class actions, including claims for litigation costs and attorney's fees.

On August 26, 1992, the District Court approved the terms of the comprehensive settlement.

Under terms of the settlement, the parties agreed and stipulated that (based on the total settlement amount of $35 million to be awarded to the class plaintiffs) the amount of attorney's fees owed to Winthrop and Weinstine was $11,166,666 (one-third of the total settlement amount after deduction of out-of-pocket expenses).

The calculation under the settlement agreement of attorney's fees in the amount of $11,166,666 used the same formula for the calculation of attorney's fees that was specified in the contingency fee agreements that the class plaintiffs had entered into with Winthrop and Weinstine (namely one-third of the total settlement amount after deduction of out-of-pocket expenses).

Pursuant to the settlement, out-of-pocket expenses in the total amount of $1.5 million were first deducted from the total award of $35 million. One-third of the $33.5 million balance of the $35 million award was then allocated to lost wages of the class plaintiffs; one-third of the $33.5 million balance was allocated to tort claims of the class plaintiffs; and one-third of the $33.5 million balance was allocated to attorney's fees.

With respect to the portion of the settlement award allocated to lost wages of the class plaintiffs, IDS issued separate checks directly to the individual class plaintiffs from which Federal and State income taxes were withheld.

With respect to the portions of the settlement award allocated to tort claims of the class plaintiffs and attorney's fees, IDS issued a single check directly to Winthrop and Weinstine in the total amount of $23,783,333, of which $12,616,666 represented the portion allocated to tort damages and $11,166,666 represented the portion allocated to attorney's fees. The total proceeds from this check were deposited into a trust account on behalf of the class action plaintiffs.

In the instant case, the parties have stipulated that the $862,906 that petitioner received under the above settlement is allocable as follows:

$273,573 – Back wages and taxable as ordinary income;

$109,429 – Tort damages and excludable from income;

$164,144 – Tort damages and includable in income;

$63,152 – Attorney's fees attributable to tort damages excludable from income and therefore also excludable from income;

$252,608 – Attorney's fees attributable to taxable portion of funds received and the tax treatment of which is in dispute herein.

On their 1992 individual joint Federal income tax return, of the total $862,906 in funds that was received from IDS on petitioner's behalf, petitioners did not report as income the $252,608 portion of the funds that was

attributable to attorney's fees allocable to the taxable portion of the funds received.

On audit, respondent determined that the $252,608 relating to attorney's fees constituted taxable income to petitioners and is deductible to petitioners only as a miscellaneous itemized deduction under section 67.

OPINION

Attorney's fees and costs awarded to prevailing parties in litigation generally are treated as received by the parties, not by the attorneys, and as items of taxable income to the prevailing parties. See *Alexander v. Commissioner*, 72 F.3d 938, 946-947 (1st Cir. 1995), affg. T.C. Memo. 1995-51; *Baylin v. United States*, 43 F.3d 1451, 1455 (Fed. Cir. 1995); *Bagley v. Commissioner*, 105 T.C. 396, 418-419 (1995), affd. 121 F.3d 393, 395-396 (8th Cir. 1997); *Estate of Gadlow v. Commissioner*, 50 T.C. 975, 979-980 (1968); *Petersen v. Commissioner*, 38 T.C. 137, 151-152 (1962); *Coady v. Commissioner*, T.C. Memo. 1998-291; *Hayes v. Commissioner*, T.C. Memo. 1997-213; *Hardin v. Commissioner*, T.C. Memo. 1997-202; *Martinez v. Commissioner*, T.C. Memo. 1997-126.

Also, taxpayers generally are treated as realizing taxable income when their expenses are paid by another. Sec. 61; *Commissione v. Glenshaw Glass Co.*, 348 U.S. 426 (1955). The Supreme Court in *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 729 (1929), stated that "The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed." See also *United States v. Boston & Me. R.R.*, 279 U.S. 732, 734 (1929).

In ADEA cases, it is established that only the prevailing parties, not the parties' attorneys, have standing to seek attorney's fees. *Benitez v. Collazo-Collazo,* 888 F.2d 930, 933 (1st Cir. 1989); *Soliman v. Ebasco Servs., Inc.,* 822 F.2d 320, 323 (2d Cir. 1987); *Brown v. General Motors Corp.,* 722 F.2d 1009, 1011 (2d Cir. 1983); *Rainsbarger v. Columbia Glass & Window Co.,* 600 F. Supp. 299, 301-302 (W.D. Mo. 1984).

We recognize that there is case law treating amounts received in litigation to cover attorney's fees as not constituting taxable income. In *Cotnam v. Commissioner,* 263 F.2d 119 (5th Cir. 1959), affg. in part and revg. in part 28 T.C. 947 (1957), the taxpayer entered into a contingency fee agreement with her attorneys under which the taxpayer agreed to pay her attorneys 40 percent of any funds recovered. In *Cotnam,* we held that the contingency fee agreement did not transfer any interest in the judgment to the attorneys, and we held that the attorney's fees that were awarded were to be included in the taxpayer's income. *Cotnam v. Commissioner,* 28 T.C. at 954.

The Court of Appeals for the Fifth Circuit reversed and held that under Alabama law the effect of the contingency fee agreement was to establish in favor of the attorneys an equitable lien on 40 percent of the funds recovered, and the Court of Appeals concluded that the portion of the funds allocated to attorney's fees was to be treated as owned by the attorneys, not by the taxpayer, and therefore that the funds allocated to attorney's fees did not constitute income to the taxpayer. *Cotnam v. Commissioner,* 263 F.2d at 125, citing 46 Ala. Code sec. 64 (1940).

In *Davis v. Commissioner*, T.C. Memo. 1998-248, we followed the Court of Appeals opinion in *Cotnam* but only because the same Alabama law and the same appellate venue were involved as in *Cotnam*. See *Golsen v. Commissioner*, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971); see also *In re Hamilton*, 212 Bankr. 384 (Bankr. M.D. Ala. 1997), applying Alabama law and following *Cotnam*.

Respondent disagrees with the Court of Appeals for the Fifth Circuit, and respondent continues to assert that, as we held in *Cotnam*, notwithstanding the peculiarities of State law, under contingency fee agreements attorneys do not acquire ownership of those portions of funds recovered in lawsuits allocable to attorney's fees, and the attorneys' clients are taxable on the full amount of the funds recovered in spite of any lien the attorneys may have thereon.

In this case, petitioner resided in Arizona when he filed his petition herein. The parties, however, have not cited any provision of Arizona statutory law, and we have found none, that pertains to the legal rights of Arizona attorneys in monetary awards recovered on behalf of their clients.

Decisions by Arizona courts have addressed this issue only to a limited extent. In *Skarecky & Horenstein, P.A. v. 3605 N. 36th St. Co.*, 825 P.2d 949, 951 (Ariz. Ct. App. 1991), it was held that under Arizona Rules of Professional Conduct attorneys are not permitted to acquire proprietary interests in funds recovered on behalf of their clients until after the judgments are rendered. 17A Ariz. Rev. Stat. Sup. Ct. Rules, 42 Prof. Conduct, ER

1.8(j) (1985); see also *State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 489 P.2d 837, 840-841 (Ariz. 1971), which held that Arizona attorneys have no right to attorneys' liens against funds recovered on behalf of their clients until after judgments are rendered or settlements are entered into.

It thus appears that, in Arizona, attorneys do not have the same substantive rights in funds recovered on behalf of their clients as do attorneys in Alabama. In Arizona, the total funds recovered constitute property of the clients. Based on the foregoing, this case is distinguishable from *Cotnam v. Commissioner, supra,* decided by the Court of Appeals for the Fifth Circuit.

In the *Glass* and *Stephens* class actions, the documentation is extensive to the effect that petitioner was entitled to and received an award of $862,906, one-third of which was then used to pay the $273,573 portion of the attorney's contingency fees for which petitioner was obligated.

Petitioners rely on *Eirhart v. Libbey-Owens-Ford Co.*, 726 F. Supp. 700 (ND. Ill. 1989), in which it was held that the defendant need not file information returns with respondent reporting as taxable income the portion of funds awarded that was allocable to attorney's fees. The court based its holding on a common fund theory that would appear to be applicable only to opt-out class actions in which, as of the time fees are awarded, not all members of a class have become identified or contractually obligated to compensate the attorneys who perform legal services for the members' benefit. This may

occur where members of a class are unknown until the conclusion of the lawsuit and in opt-out class actions.

In opt-out class actions, persons must affirmatively decline to be a member of the class or they are automatically members of the class. In these opt-out class actions, there may be policy reasons to treat funds recovered and used to pay attorney's fees as nontaxable to the class members (namely, additional members of the class may later be identified and held responsible for a portion of the legal fees).

On the other hand, in opt-in class actions such as the *Glass* and *Stephens* class actions against IDS, members must affirmatively join the class to be considered class members. The consequence of not specifically joining opt-in class action is that the person not joining the class is not entitled to share in the funds recovered by settlement or judgment.

Thus, in the opt-in class action lawsuits against IDS, when the class closed, all class plaintiffs were identified, and current and former employees of IDS who did not join were notified that they were not entitled to share in any recovery.

Petitioner asserts that the attorney's fees were not awarded to him personally, but rather that they were awarded directly to Winthrop and Weinstine. Petitioner points to the fact that Winthrop and Weinstine was the sole payee on the $23,783,333 check that included the portion of the funds recovered allocable to attorney's fees, and petitioner argues that under ADEA an award of attorney's fees is authorized directly to the plaintiffs' attorneys.

We note that the $23,783,333 check included the $12,616,666 portion of the award allocated to tort damages awarded to the class action plaintiffs and that the total amount of this check was deposited into a trust account in favor of the class action plaintiffs. Presumably, if the class action plaintiffs had no interest in the portion of the funds allocable to attorney's fees, two checks would have been requested, and each check would have been deposited into separate accounts – one for the class action plaintiffs in the amount of $12,616,666 representing the tort damages received and one for Winthrop and Weinstine in the amount of $11,166,666 representing the attorney's fees.

The relevant documentation in the *Glass* and *Stephens* class action lawsuits against IDS repeatedly acknowledges that attorney's fees would be owed by the class plaintiffs and that amounts allocated and to be used to pay attorney's fees were to be awarded to the class plaintiffs, not to the attorneys.

Petitioners argue that because the class action lawsuits provided benefits to persons other than the class plaintiffs, the attorneys acted as private attorneys general. We note that Winthrop and Weinstine never sought relief on behalf of unnamed plaintiffs. Injunctive relief on behalf of all employees of IDS was sought by the EEOC. Correspondence mailed by Winthrop and Weinstine to potential class members explained that employees of IDS not joining the class would not receive any damages. It was EEOC, not Winthrop and Weinstine, that requested broader relief that would extend beyond the class plaintiffs.

In summary, the $252,608 portion of the total award received by petitioner from IDS in the class action lawsuits that is allocable to attorney's fees and that is in dispute herein is to be included in the taxable income of petitioner.

Decision will be entered for respondent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES T. SINYARD; MONIQUE T. SINYARD, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 99-71369 Tax Court No. 11056-96 ORDER (Filed Dec. 17, 2001)

Before: NOONAN, McKEOWN, and WARDLAW, Circuit Judges:

The majority of the panel as constituted in the above case has voted to deny the petition for rehearing. Judge McKeown would grant the petition for rehearing. Judge Wardlaw voted to reject the suggestion for rehearing en banc and Judge Noonan recommended rejection of the suggestion for rehearing en banc. Judge McKeown would accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.